(25)



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 427-428

INLAND STEEL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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## SUBJECT INDEX.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Inland Steel Company by Carl Meyer, Paul M. Godehn, and J. F. Dammann, its attorneys, respectfully shows:

## STATEMENT OF MATTER INVOLVED.

This is an action in equity by the Lebolds against Inland Steel Company for an accounting for damages claimed to have resulted from an asserted wrongful dissolution of the Steamship Company, a West Virginia corporation, of which they were minority stockholders. The Steamship Company was an 80% owned subsidiary of the Steel Company, and its business since its formation in 1911 by the Steel Company and the plaintiffs' father, Nathan Leopold, from whom they inherited their stock, consisted of carriage on the Great Lakes of the Steel Company's ore, coal and stone to its plant at the south end of Lake Michigan.

The dissolution was effected under a statute of West Virginia providing for voluntary dissolutions by stockholders on a vote of 60% or more of the stock.

The first meeting called to consider a resolution to dissolve was stopped by the plaintiffs securing a District Court order enjoining the proposed dissolution and sale of the Steamship Company's assets. (O. R. 144, 149.)*

On hearing the District Court dissolved this injunction. The Circuit Court of Appeals affirmed. (*Lebold* v. *Inland Steamship Company,* 7th Circuit, 82 Fed. (2d) 351; Also, Appendix to this Petition, Page I.)

The meeting was then held and the dissolution and sale were voted for by the Steel Company's 80% majority stock. (O. R. 42, 43.) The physical assets of the Steamship Company, consisting chiefly of three ore boats, were then bid in at the sale by the Steel Company for a price

* The letter "R" is used to indicate references to pages 1 to 235 of the Record. The letters "O. R." are used to refer to the printed record on a prior appeal of this case. This prior record starts at page 237 and consists of the pages thereafter numbered from 1 to 240.

that has always been admitted to be fair and adequate for those properties. (O. R. 42; R. 57.) However, after the net proceeds of the sale had been ratably distributed to the stockholders and the corporation dissolved, the plaintiffs, claiming an additional value represented by the past earnings of the Company made from the carriage of the Steel Company's traffic at capacity operation and going rates, filed this bill for an accounting and charged that the Steel Company had used the legal instrumentality of dissolution to freeze out the minority interest and to appropriate without paying for it the Steamship Company's business of carrying the Steel Company's traffic.

At the trial the plaintiffs stipulated that there was in effect no contractual arrangement of any kind requiring a continuance of the traffic condition which was responsible for the Company's earnings. (O. R. 194.) They further stipulated that without the traffic of the Steel Company the Steamship Company's operations on the Great Lakes would have resulted in substantial yearly losses. (O. R. 196.) The District Court held there had been no fraud by the defendants, that the plaintiffs had been given full value, and denied any recovery. (O. R. 230.) The Circuit Court of Appeals held, 125 Fed. (2d) 369, (also Appendix to this Petition, Page XXIV) with the plaintiffs and reversed and remanded the case to determine damages. Certiorari was denied by this court April 27, 1942, 316 U. S. 75.

Upon the hearing on damages, the District Court valued the stock of the Steamship Company as representing all of its assets and included in those assets for valuation the asserted property right of the Steamship Company as a going concern to carry the Steel Company's traffic and accordingly capitalized its past earnings.

The judgment as entered was based on the value of $2,350 per share, less liquidating dividends, together with interest, or the sum total of $684,341.32.

On appeal by the Steel Company, the Circuit Court of Appeals refused to change its former ruling as to liability, but found that the evidence did not justify a value of the stock in excess of $1,350 per share and entered judgments in the two cases (there being two appeals) in the amount of $299,317.42. (R. 225, 226.) This judgment also represented a valuation solely of the alleged property right of the Steamship Company to carry the Steel Company's traffic at capacity operation and at going rates for an indefinite time in the future, *Lebold* v. *Inland Steel Company,* 136 Fed. (2d) 876. (Also, Appendix, Page XX.)

This petition seeks to review the basic error in the judgment which charges the Steel Company with receiving through the public sale of the Steamship Company's assets, property which was not the Steamship Company's to sell and which the Steel Company did not acquire by virtue of that sale, but which was and always had been its own property—the right to transport its own traffic in its own boats or in any other way. That basic error of forcing the Steel Company to buy and pay for its own property is the error sought to be reviewed and corrected through this petition. The figures with reference to it merely show that the error was important and resulted in a substantial penalization of this petitioner.

There is no substantial dispute of fact in the record here which consists of the evidence, including a stipulation of facts, before the District Court and the Circuit Court of Appeals in the injunction case referred to above, as well as the evidence presented at the other two hearings.

## (1) The Business the Steamship Company Was Engaged In.

For many years it has been the practice of the steel business on the Great Lakes to have ore, limestone, and some coal transported in boats of one or the other of two classes

—those belonging to the steel companies themselves or their wholly owned subsidiaries, or those belonging to independent contract carriers who obtain in the open market such tonnage as can not be moved by the steel companies' boats because of lack of capacity. (O. R. 46; R. 79, 80.) The capacity of all the boats on the Great Lakes is much greater than available traffic. The result is that the boats owned by the steel companies, called captive ships, travel at capacity operation during the season, while the competitive carriers secure only a small proportion of the traffic. (O. R. 80, 81.)

The freight rates for this carriage are not fixed by any Federal or State rate making body, but they are the result of competition, and over the years have remained more or less unchanged. (O. A. 46, 192.) They are sufficient in fact, to produce for some competitive ship owners a fair return on their capital investment. (R. 88-96; 122-126.)

### (2) Inland Steamship Company.

Prior to 1911 when the Steel Company was small and controlled by a few families (R. 128), it had all of its traffic carried in the boats of competitive carriers. In that year the plaintiffs' father Nathan F. Leopold suggested to his brother-in-law, P. D. Block, who was one of the founders of the Steel Company and its then Vice President and later President, that a subsidiary corporation be organized to acquire cargo vessels and transport its own traffic on the Great Lakes. This subsidiary was not, however, to be wholly owned by the Steel Company. (O. R. 56.)

Pursuant to this suggestion the Steamship Company was organized under the laws of West Virginia with an authorized capital of $160,000, 1,600 shares at $100 per share. (O. R. 138-141.) The Steel Company acquired 1,080 shares or 67.5% of the total; Nathan Leopold acquired 295 shares or 18% of the total, for which he paid $29,500 (O. R. 205);

225 shares were acquired by the officers and employes of the Pioneer Steamship Company (O. R. 196, 205) which later became the operator of the ships of the Steamship Company under a management contract (O. R. 193) and also the carrier of the surplus tonnage of the Steel Company. (O. R. 46, 49.)

The Steamship Company acquired two ships and later a third (O. R. 190-191) and operations began and continued for a period of 24 years. Its activities were limited almost exclusively to the carriage of the traffic of the Steel Company at capacity operation (except during the depression year of 1932) and at the so-called going rates paid to the competitive carriers on the Great Lakes. (O. R. 196.)

The Steamship Company had no administrative expense. It was managed by the Steel Company's officers without pay. Its clerical work was performed by the Steel Company's employes without charge, in the offices of the Steel Company, without rent. Its actual operation was performed by another company, Pioneer Steamship Company, for an annual fee. (O. R. 193.)

During the period of its existence the Steamship Company paid out of earnings almost two-thirds of the cost of the first two boats and practically all of the cost of the third boat, $1,400,000 in all.

In addition, it earned $3,237,413.28 and paid dividends of $2,824,000 on its capital stock of $160,000. The plaintiffs' and their father were paid on his $29,500 investment average annual dividends of $21,694, totalling $520,675 for the period. (O. R. 101.)

During the entire period of the Steamship Company's existence, the yearly dividends of the company averaged $75 (O. R. 141) and during the last 11 years $105 per share, and during the last 3 years, $150 per share. (Bill of Complaint 4, Par. 7, Answer, O. R. 21; Stipulation, Par. 2, O. R. 191.) The plaintiffs' expert witnesses esti-

mated the earnings for the future at $200 per share on the assumption that the Steamship Company would continue to carry the Steel Company's traffic at going rates and capacity operation. (R. 21, 39, 68.) There was nothing abnormal or unusual about the ore traffic on the Great Lakes or about the ships of the Steamship Company as compared with other ore ships. (O. R. 97.) There was no shortage in the market for such boats. In fact, there was an oversupply. (R. 78.) (Sale of the Franklin Company's boats May 1936, R. 70.)

The admitted fact is that the company's abnormally high earning record was due to the carriage by the Steamship Company of the Steel Company's traffic at capacity operation and at so-called going rates.

**(3) The Termination of the Traffic Relationship Between the Two Companies.**

In December, 1934, the officers of the Steel Company brought up the question, how long the Steel Company in the interest of its own stockholders could continue having its traffic transported by its partially owned subsidiary at a cost which was netting to the subsidiary 150% dividends yearly. (O. R. 51, 52, 79, 165.) There being no contractual arrangement of any kind between the companies (O. R. 194) and it being a fact that the traffic had been placed by the Steel Company with the Steamship Company for so many years, largely because of the close personal relationship and kinship between P. D. Block, the President, and Nathan Leopold, his brother-in-law and the father of these plaintiffs, the conclusion was reached that the time had come when the relationship between the two companies should cease so that the Steel Company could be free to place its traffic where it could best do so. It would not do to force the Steamship Company to carry the traffic at rates lower than the going rates, as that would

still further complicate the majority-minority stockholder relationship. (O. R. 98.) The final conclusion of the Steel Company to discontinue the traffic relationship was communicated to the Steamship Company's stockholders at their meeting on December 21, 1934. (O. R. 85, 55, 74, 96, 98.) This decision, it was stated, was unalterable. (O. R. 99, Bill of Complaint 5; Answer, O. R. 23.)

**(4) The Offer of the Steel Company to Buy the Minority Stock or Sell Its Own at a Price of $700 Per Share.**

Having reached the conclusion to end the traffic situation the Steel Company first endeavored to buy the minority's interest. The physical properties of the Steamship Company, consisting chiefly of the three boats, were appraised at a valuation which the plaintiffs admit is fair. (R. 57.) And on the basis of that appraisal, the Steel Company offered to pay the minority stockholders $700 per share for the stock which had been bought for $100 per share. (O. R. 165-166.) The offer was accepted by the owners of 200 shares so that the majority interest of the Steel Company was increased to 1280 shares or 80%. The plaintiffs owning 295 shares and one other stockholder owning 25 shares refused the offer. (O. R. 196.) The Steel Company then offered to sell all its stock in the Steamship Company to the plaintiffs or their nominees at $700 per share, but this offer was also refused. (O. R. 97.) At that time there were available for purchase on the Great Lakes at equally favorable prices plenty of boats that would fill the Steel Company's need just as well as the Steamship Company's three boats. (O. R. 48, 52, 60, 70, 195.)

**(5) Lebold v. Steamship Company.**

It appearing that no agreement could be made for the purchase or the sale of the stock the first meeting was called. At the hearing to dissolve the temporary restrain-

ing order secured by the plaintiffs enjoining the dissolution and sale, the Steel Company again stated it would bid for the three ships an amount representing $700 per share of stock, but that it would be glad to let the ships go to anyone else who would bid higher, as it had no interest in the ships as such. (O. R. 96, 97, 101.)

In dissolving the injunction and dismissing the complaint for want of equity, the Judge of the District Court noted that the Steel Company was *not only free from any charge of fraud* in bringing to an end the traffic arrangement between the two companies, but that the Steel Company's stockholders might well have criticized the Steel Company for not doing so.

On appeal by the plaintiff the Circuit Court of Appeals, on March 18, 1936 (82 Fed. (2d) 351), affirmed the lower court's denial of the injunction against the dissolution and sale of assets and noted that in the event the Steel Company should carry out its proposed purchase of the assets the majority would be entitled to their pro rata share of the common property, including the going concern value of the Steamship Company.

### (6) The Dissolution Sale in May 1936.

Thereupon the meeting was held and the statutory 60% of the stock having voted for the dissolution, a public sale took place and the dissolution was completed. (O. R. 111, 112.) The sale was well advertised with particular attention to some 270 concerns who are engaged or interested in transportation on the Great Lakes. (O. R. 107, 115.) There being no bids other than the Steel Company's announced bid, the three boats were sold to the Steel Company. (O. R. 42, 43.) They have been used ever since to carry the Steel Company's own traffic. After taking care of the company's liabilities, liquidating dividends amounting to $604.17 per share were paid to the stockholders and the

plaintiffs received $178,230.15, which when added to the dividends already received on their stock made a total return on the original $29,500 investment of $698,905.15 for the 24 year period. (O. R. 130.)

### (7) The Bill of Complaint in Lebold v. Inland Steel Company.

The plaintiffs then brought this suit against the Steel Company, alleging that the stock of the Steamship Company was in reality worth $4,000 per share and charging that as a result they had been defrauded by the Steel Company and its president and other officers in the amount of $1,101,769.85. (O. R. 2-15.)

There was no claim ever made that there was or had been any contract obligating the Steel Company to furnish tonnage to the Steamship Company for transportation. A stipulation of facts was entered into between the parties. Its introductory paragraph was as follows:

> (1) "the facts hereinafter set forth are to be regarded as admitted, without the necessity of any proof being offered in support thereof, and
>
> (2) "the plaintiffs or defendant may introduce further evidence in amplification, but not in contradiction, of said facts." (O. R. 190.)

This agreement is followed by 32 paragraphs of facts. We reproduce paragraphs 16 and 23 with underscoring for emphasis.

> "16. At the time of the dissolution of Steamship Company, there was no contractual arrangement of any kind between Inland Steel Company and Steamship Company with reference to the carrying by Steamship Company of all or any part of the tonnage of said Inland Steel Company. This situation had existed for more than ten years before the dissolution of Steamship Company. (O. R. 194.)
>
> "23. The cessation of the carriage of Inland Steel

Company's tonnage via the steamers of Steamship Company would have resulted in substantial yearly net losses to Steamship Company, and would further have resulted in the disuse of said steamers and consequent deterioration and depreciation in their value." (O. R. 196.)

**(8) The Decree and Findings of the Trial Court at the First Trial.**

The District Court, sustaining the report of the Master to whom the case had been referred, found that the sale had been appropriately advertised and fairly conducted; that a fair price had been paid for the boats and physical assets; that there was no express, implied or quasi contractual relationship between the Steel Company and the Steamship Company requiring the Steel Company to transport its freight traffic via the boats of the Steamship Company; that the Steel Company had a right to give its business where it pleased for any reason and was under no obligation to continue giving it to the Steamship Company; that the Steel Company did not appropriate the business of the Steamship Company or anything belonging to the minority stockholders and had not taken an unfair advantage or practiced any fraud against the minority interest; that the value of the minority interest did not exceed the amount that had been distributed to it; that the dissolution and sale were properly conducted under the West Virginia law. The bill was dismissed for want of equity. (Master's Report and Findings, O. R. 202-212; Court 222-230.)

**(9) Plaintiffs' Appeal to the Circuit Court of Appeals.**

The Circuit Court of Appeals, on appeal by the plaintiffs, reversed and remanded and stated a rule of damages to be followed by the trial court as follows:

"The damages to be allowed are the difference between what plaintiffs have received from the sale of

> the physical assets and what the stock was really worth as stock in a going prosperous concern continuing in business. Upon that rule the trial court will fix plaintiffs' Damages."
>
> *Lebold* v. *Inland Steel Company*, 125 Fed. (2d) 369; also Appendix B, Page XIX.

The court also held that the Steel Company in voting the dissolution sale and buying the boats for use in carrying its own freight was guilty of fraud and would have to account to the minority for the share of the future profits which the Steel Company would make in continuing the appropriated business of carrying its own freight in its own boats. This opinion was unanimous. Lindley, District Judge, wrote it, and Evans and Sparks, Circuit Court Judges, concurred.

### (10) Hearing on Damages September 1942.

On remand the trial judge had great difficulty in deciding the period of time for which he should assume that the exceedingly prosperous business of the Steamship Company in carrying the Steel Company's traffic would have continued if the corporation had not been dissolved or had been sold to someone else. (R. 55.) He finally avoided the problem by quoting in his language the Circuit Court of Appeals language, "going prosperous concern continuing in business", without making any finding on the question of duration. The plaintiffs at this hearing proceeded on the theory advanced by the Circuit Court of Appeals and produced three experts who testified to valuations of $3,000, $3,100 and $3,200 per share respectively, all *entirely based* on the past earnings of the company and the assumption that the Steel Company's traffic would *continue* with the Steamship Company for an indefinite time in the future at going rates and capacity operation. They frankly said so. (Coffman, R. 6, 26, 27, 33; Friday, 33, 38, 39, 46, 47; Hammond, 61, 69.)

The defendant proceeded on the theory that the valuation of the stock of the Steamship Company should not include any value of the asserted property right of the Steamship Company to carry the Steel Company's traffic; that the value of the company as a going concern was represented in the value of the physical assets as in effect stipulated to by the plaintiffs in the stipulation of facts; and that another simultaneous sale of a similar Steamship Company operating on the Great Lakes demonstrated that fact; and finally, even on the assumption of the Steamship Company continuing within a reasonable time as *a competitive carrier* on the Great Lakes, the stock on *estimates* of accountants and experts would not be worth more than an amount somewhere between $630 and $818 per share. (R. 123, 126.)

Some years prior to the dissolution, these plaintiffs themselves put another valuation upon this stock, as the executors of their father's estate, and for purposes of Illinois Inheritance and Federal Estate taxes. He died in 1929. There was little change in value meanwhile. They returned the stock for tax purposes at $250 per share. The Federal authorities objected and after an investigation set a value of $500 per share. (O. R. 101, 102.)

At the close of the hearing to determine the damages, the District Court, obeying the mandate of the Circuit Court of Appeals, included for valuation the asserted right of the Steamship Company to carry the Steel Company's traffic at capacity operation and going rates for an indefinite future and capitalizing its earnings, found that the stock was worth not less than $1,500 per share and not more than $3,200 per share, and gave judgment of $2,350 per share. (R. 142.)

**(11) Appeal to the Circuit Court of Appeals.**

The Steel Company appealed and the plaintiffs took a cross-appeal. The Circuit Court of Appeals rendered its opinion June 16, 1943. (R. 145, 154, 146, 136 Fed. (2d) 876, Appendix C to this Petition, Page XX.) The court refused to change its former ruling as to liability. Lindley, District Judge, was of the opinion that the trial court's valuation of $2,350 was amply supported by the evidence. (R. 175, Appendix, Page XXII.) But Evans and Kerner, circuit judges, were of the opinion that the evidence did not justify a value in excess of $1,350 per share. (Appendix XXIII.) The dissenting judge, Lindley, wrote the opinion for the majority (R. 172, 176) and speaking for the majority, said:

> "After mature and careful analysis of all the evidence, therefore, the court finds that it does not justify a finding of value of the shares in excess of $1,350 each, or an allowance of damages in excess of the difference between that value and the amount plaintiffs have received." (R. 175-176.)

At a conference which then took place between all counsel and the senior judge for the Circuit Court of Appeals to determine the boundaries of the retrial directed, it developed as appears from the plaintiffs' petition for rehearing (R. 205, Point 4), that a point, not mentioned in the court's opinion and never argued by either side during any part of the litigation, had been given a great deal of weight by the court in reaching a conclusion. (R. 205-206.) On July 8, 1943, both parties filed petitions for rehearing. Both petitions were denied but the court wrote a further opinion modifying its first opinion (Appendix D to this Petition, Page XXIV) and deleted the sentence in the opinion of July 16 remanding the case to the trial court and directed that the amount of the judgment be modified and as modified be affirmed. Judgments were entered on July 29, 1943, *nunc pro tunc* as of July 16, 1943, in both cases,

Nos. 8233, 8234, on the basis of $1,350 per share; that is to say, in the amount of $220,019.85 together with interest of $79,598.97, or a total of $299,618.82. (R. 225-226.)

There can be no dispute in this record that this judgment is based solely and entirely upon the alleged right of the Steamship Company to force the Steel Company to continue giving its traffic to the Steamship Company indefinitely in the future, or that if it should ever stop doing so, to account to the Steamship Company for the profits the Steel Company would expect to make in carrying its own traffic in its own boats.

## STATUTES INVOLVED.

The West Virginia statute governing voluntary dissolution in effect at the time of the dissolution in this case is § 80, Article I, Ch. 31, of the Code of West Virginia on Corporations, West Virginia Code of 1937, Sec. 3092. It is set out at Record p. 135. The pertinent provisions thereof are as follows:

> "§ 80. Voluntary dissolution. * * *
> The stockholders at any time may resolve to discontinue the business of the corporation, at least sixty per cent of the shares of capital stock entitled to vote being present at the meeting and voting in favor of such discontinuance, and may divide the property and assets among those entitled thereto, after paying all the debts and liabilities of the corporation."

## OPINIONS BELOW.

*Lebold* v. *Inland Steamship Company,* 82 Fed. (2d) 351. Decision of March 18, 1936, denying an injunction against carrying forward the dissolution and sale of assets. (Appendix A to this Petition, Page I.)

*Lebold* v. *Inland Steel Company,* 125 Fed. (2d) 369. Decision of December 29, 1941 (O. R. 249), on appeal by the plaintiffs, the minority stockholders, reversing and remanding to determine damages. (Appendix B to this Petition, Page X.)

Certiorari denied April 27, 1942, 316 U. S. 675.

*Lebold* v. *Inland Steel Company,* 136 Fed. (2d) 876. Decision of June 16, 1943. (Appendix C to this Petition, Page XX.)

*Lebold* v. *Inland Steel Company,* 136 Fed. (2d) 876. Decision of July 16, 1943, modifying prior opinions and decree determining damages. (Appendix D to this Petition, Page XXIV.)

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. A. 347.

The original opinion was filed on June 16, 1943. (R. 172.) Petitions for rehearing were filed by both parties on July 8, 1943. (R. 179 and 195.) A second opinion, which modified the first opinion as to matters of substance and also denied rehearing, was filed on July 16, 1943. (R. 223.) Judgments were entered on July 29, 1943, *nunc pro tunc* as of July 16, 1943. (R. 225.)

The jurisdiction of this Court is invoked to review not only the judgments of July 29, 1943, but also the decision on the prior appeal rendered on December 29, 1941, and the judgment of the Court reversing the cause to the trial court for the assessment of damages. (Appendix B to this petition.) The denial of certiorari to review the judgment of December 29, 1941, is not a bar, does not change the situation (*Hamilton Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 250; *Toledo Scale Company* v. *Computing Scale Co.*, 261 U. S. 399), nor is the decision of the Circuit Court of Appeals as to the liability of the defendants, 125 Fed. (2d) 269 (Appendix B, page X), the law of the case before this court. *Messenger* v. *Anderson*, 225 U. S. 436, and cases cited.

## QUESTIONS PRESENTED.

1. Whether a corporation, which is a majority stockholder of a solvent and prosperous West Virginia subsidiary corporation, commits a breach of trust by voting in its own interest and against the interest of the minority stockholders of such subsidiary to dissolve it, and then purchases for use in its own business the subsidiary's physical properties at a fairly conducted dissolution sale for a fair price which is ratably distributed?

2. Whether a corporation which furnishes lucrative business for a period of years to a West Virginia corporation in which it owns more than 60% of the capital stock, is a trustee for the minority stockholders in the sense that the parent corporation cannot exercise the statutory right to dissolve the subsidiary without paying to the minority, as damages for putting an end to a prosperous business, an amount in excess of their proportionate share of the fair value of all of the properties and assets owned by the corporation, less its liabilities?

3. Whether a court can base a decision upon a premise or assumption which is contrary to facts stipulated and agreed to by all of the parties acting by their attorneys?

## REASONS FOR GRANTING THE WRIT.

The Circuit Court of Appeals in this case has decided an important question of local law in conflict with the applicable local statutes and decisions.

*Ruhling* v. *New York Life Insurance Co.*, 304 U. S. 202, 206.

*The Applicable Local Law.*

The rights of the stockholders of this West Virginia corporation are governed by the local statutes and decisions of that State.

*Rogers* v. *Guaranty Trust Company*, 288 U. S. 123, 129.

*Germer* v. *Triple State Natural Gas & Oil Co.*, 60 W. Va. 143, 54 S. E. 509.

The dissolution of the corporation as voted by the Steel Company holding 80% of the stock was effective through the West Virginia statute authorizing voluntary dissolution on a 60% vote.

West Virginia Code of 1937, Sec. 3092 • • • Chap. 31, Art. I, Par. 80; also Page 15 of this Petition.

Plaintiffs' Ex. 39, 40; R. 104, 105.

A sale of the corporate assets, a necessary step in the dissolution, as voted by the same majority was also effective through another West Virginia statute authorizing sales of corporate assets on a 60% vote.

Code of West Virginia 1937, Corporations, Sec. 3076 (64), Chap. 31, Art. I, Par. 64.

Under the law of West Virginia, a majority stockholder, acting with reference to a dissolution and sale of assets

under the statutes, may vote his stock entirely as his own personal interests dictate; he has no duty to consider the interests of other stockholders.

*Thurmond* v. *Paragon Colliery Co.*, 82 W. Va. 49, 53, 54; 95 S. E. 816, 817.

A criticism of the Circuit Court of Appeals decision in *Lebold* v. *Inland Steamship Company*, 125 Fed. (2d) 369, (Appendix B, Page X) contains the following in part: (University of Chicago Law Review, October 1942, Vol. 10, No. 1, Pages 7 to 84, at page 78):

> "Although the rule that the majority stockholders stand in a fiduciary relationship to the minority is often enunciated in the cases, it seldom has been applied to the action of the majority in bringing about dissolution. It is only under statutes such as that of New York, which requires that the dissolution be 'advisable,' that the courts have required majority stockholders to consider the 'corporate good' above their own personal interests in deciding whether the corporation should be dissolved. The statutes in most states, West Virginia among them, apparently give the specified percentage of the stockholders the absolute right to dissolve the corporation without regard to the interests of the minority. Similar statutes providing for the sale of the entire assets of a corporation by a majority vote have been interpreted in the same way. * * *"

And again at page 83:

> "* * * The whole question, of course, is whether the business might reasonably be expected to continue. To begin with, nowhere does the court say that Inland, once having placed traffic with the subsidiary, is bound to do so indefinitely. If it is not bound, the parent would not seem to have appropriated any good will or going concern value whatever. Furthermore, it should be apparent that the huge earnings of the steamship company could not possibly continue even if there had been no dissolution. Annual earnings of 150 per cent of the original capital investment, made

over a period of 25 years, and all made from business furnished by a single customer, suggest that the customer has been overpaying for the service it is getting. * * *"

Under the West Virginia law, a majority stockholder may purchase the dissolved corporation's assets at a fair price, and the principles of law governing trustees and other fiduciary relationships do not apply to the so-called fiduciary relationship of majority and minority stockholder to the extent that a majority stockholder purchasing properties of the corporation must account for a price which includes future profits that may be made from those properties.

*Reilly* v. *Oglebay*, 25 W. Va. 36, 43.

"The same rule (that a fiduciary can not himself buy trust property) does not generally apply to the stockholders of a corporation which is managed by a board of directors. Whether it does or not must depend upon the special facts of the particular case, the general rule being that a stockholder of such corporation may purchase."

*Warren* v. *Black Coal Co.*, 85 W. Va. 684, 690; 102 S. E. 672, 674.

*Tierney* v. *United Pocahotas Coal Co.*, 85 W. Va. 545, 559; 102 S. E. 249.

*Wiley* v. *Reaser*, 86 W. Va. 415, 423; 103 S. E. 362, 365.

*Howard* v. *Tatum*, 81 W. Va. 561, 567; 94 S. E. 965.

Under the law of West Virginia, there was nothing illegal, fraudulent or unfair about the dissolution and sale. It was carefully and extensively advertised. The price paid by the majority stockholder was better than the appraised value, admittedly fair. The sole contention of the plaintiffs is that the stock had another value not represented in the value of the physical assets.

The law of West Virginia is against the plaintiffs and the Circuit Court of Appeals' decision on this issue. Under the law of West Virginia, the majority stockholder buying the assets of a corporation must pay a fair price. A price to be fair is one that any willing buyer having no other interest would pay to a willing seller for such assets.

> *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 559; 102 S. E. 249, 255.

Under the law of West Virginia, the full value of the Steamship Company as a going concern was no greater than the value that would be put upon it by a disinterested willing purchaser; and the majority stockholder making such a purchase would be in no different position and would be required to account for no higher value than any disinterested purchaser buying such a property from a willing seller.

Under the law of West Virginia, upon a purchase of the assets of the corporation by the majority stockholder the minority stockholder has no right to an interest in the property after the sale, or to an accounting for the profits that the majority may make out of that property. If the minority stockholder elects not to repudiate the transaction and demand a return of the property to his corporation, he can only recover for his share of the actual value of the property.

> *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545; 102 S. E. 249; 89 W. Va. 402, 407; 109 S. E. 339, 341.

Under the law of West Virginia, the minority stockholder is not entitled to profits depending upon future conditions and contingencies.

> *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545; 102 S. E. 249; 89 W. Va. 402, 407; 109 S. E. 339, 341.

Under the law of West Virginia, the right to carry the traffic of the Steel Company was not a property right of the Steamship Company to be included in its so-called going concern value. No willing buyer would have considered it or paid for it. The majority stockholder is not required to account for a property right which the corporation did not own. To hold a majority stockholder to account for a higher price would do more than to award compensatory damages and penalize him, contrary to equity principles.

*Southern Pacific Ry.* v. *Bogert*, 250 U. S. 483.

The Court of Appeals has decided this case contrary to the decision of this court in Southern Pacific *vs.* Bogart. The court there held that the minority stockholders had a right to receive in connection with a reorganization sale their "pro rata share of the common property" and "a fair participation in the fruits of the sale." The plaintiffs in this case have admittedly received their pro rata share of the physical properties and a fair participation in the fruits of the dissolution sale, but the Court of Appeals has held that in addition thereto the plaintiffs are entitled to receive a large award of damages arrived at by capitalizing past earnings, resulting from the carriage of the traffic of the Steel Company in the past, a right which was no part of the Steamship Company's "common property."

*Southern Pacific Ry.* v. *Bogert*, 250 U. S. 483.

Such an allowance would have been justified if an unexpired contract, requiring a continuance of the traffic arrangement between the two corporations, had been breached by means of a dissolution. But the parties to this case stipulated and agreed that "there was no contractual arrangement of any kind between Inland Steel Company and the Steamship Company with reference to the carrying by Steamship Company of all or any part of the tonnage of said Inland Steel Company." (O. R. 194.) This stipula-

tion is binding upon both the court and the parties. The Eighth Circuit Court of Appeals so held in *Nelson* v. *United States*, 131 F. (2d) 301, and in *Iowa Bridge Co.* v. *Commissioner*, 39 F. (2d) 777. The Fourth Circuit Court of Appeals so held in *Norfolk National Bank* v. *Commissioner*, 66 F. (2d) 48. The Court of Appeals for the Seventh Circuit has failed and refused to give effect to the agreed and stipulated fact that there was no contract between the Steel Company and the Steamship Company with reference to a continuance of the traffic arrangement which was responsible for the past profits of the Steamship Company. The parties further stipulated and agreed that without this traffic arrangement the Steamship Company would have suffered substantial yearly losses. (O. R. 196.)

Neither the Steel Company nor its officers were guilty of any fraud against the plaintiffs. The original promoters of the Steamship Company, the Steel Company through its Vice President, P. D. Block, and his brother-in-law, the father of these plaintiffs, knew the duties of the Steel Company towards its stockholders with reference to any proposed traffic arrangement between the two companies, and that any effort on their part to make that traffic arrangement perpetual, however much of a burden it might be on the Steel Company, would be a breach of their duty. There is no word in this record that they intended to make an arrangement which would be perpetual. If they had attempted to do any such thing by whatever scheme, any court upon proper showing would, we submit, have set such a scheme aside as a fraud on the Steel Company and its stockholders. These decisions sought to be reviewed engraft on the original idea of the promoters of this corporation just such an inequitable scheme. And the decree entered has accomplished in part at least what would have

been set aside as a fraud had the original promoters effected it.

*Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 90.
*Natural Gas* v. *Slattery*, 302 U. S. 300.
*Hope* v. *Salt Co.*, 25 W. Va. 789.
*Gilmore* v. *Lewis*, 105 W. Va. 102, 141 S. E. 529.

*The Question of Local Law Decided Is an Important Question.*

The question thus decided by the Circuit Court of Appeals is vitally a part of the corporation law of West Virginia, as announced in its statutes and decisions. The question affects many vital and important rights of stockholders with reference to West Virginia corporations and as between themselves and, the liabilities and rights of subsidiaries and parent corporations.

These decisions, in fact, rest on a basic proposition that if the majority stockholder is a corporation doing business with the subsidiary corporation, it must continue to do so indefinitely or if it terminates the relationship, account on the theory that the business would have continued indefinitely. And so they engrat upon the corporation law of West Virginia a proposition which is in conflict with the general principles of corporation law of that state, as above pointed out, and is not supported by any authority in any other jurisdiction in the United States. No authority has been cited by the plaintiffs at any time to support it. We have been able to find none. Nor is there anything to be found in any of the treatises discussing the valuation of the rights of minority stockholders or subsidiary corporations, even suggesting that any such proposition would be sound from a legal, equitable or economical standpoint.

The reading into the West Virginia law governing its corporations of any such proposition as that upon which

this decision stands is of vital importance to the corporation law of West Virginia and to the many corporations existing by virtue of the law of that state, as well as also other states where similar statutes exist.

WHEREFORE, it is respectfully submitted that the writ of certiorari should issue to review the decree entered by the Circuit Court of Appeals for the Seventh Circuit on December 29, 1941, finding that the petitioner was liable to the respondents and remanding the cause for the determination of damages, and the decrees entered on July 29, 1943, *nunc pro tunc* as of July 16, 1943, directing the petitioner to pay to the plaintiffs, the Lebolds, $299,618.82.

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## APPENDIX A.

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**The First Opinion, Lebold v. Inland Steamship Company, 7 Cir., 82 F. (2d), 351, decided March 18, 1936.**

Before EVANS and SPARKS, *Circuit Judges*, and LINDLEY, *District Judge*.

LINDLEY, *District Judge*.

Appellants, minority stockholders of appellee, brought this suit to enjoin appellee from taking any steps to dissolve or to discontinue its corporate existence or any other action tending to interfere with the usual operation of its business. Appellants claimed that the acts of appellee, its directors and its majority stockholder, the Inland Steel Company, were such as wrongfully to coerce appellants and to bring about legal injury to them as minority stockholders. Appellee filed its answer, and, upon hearing, the Court dismissed the bill for want of equity. This appeal followed.

Appellee, incorporated in 1911, having an outstanding capital stock of 1,600 shares, each of the par value of $100, owns and operates three steamships on the Great Lakes. Prior to May, 1935, the Inland Steel Company owned 67.5 per cent. of appellee's stock, and since that time has owned 80 per cent. thereof. Appellants own 295 shares, formerly held by their father, one of the original incorporators. P. D. Block is president and C. B. Randall the Vice-President of both appellee and the Steel Company. L. E. Block is chairman of the board of the Steel Company. L. E. Block, P. D. Block, C. B. Randall, and one of appellants comprise appellee's board of directors. A former additional director resigned when he sold his stock to the Steel Company. Thus three of appellee's executive officers and four directors are likewise executive officers and directors of its majority stockholder, the Steel Company.

Appellee's business is derived almost entirely from the Steel Company, for which it carries ore, coal, and stone. For several years preceding 1935, dividends of $150.00 per share were earned and paid, over and above all deduc-

tions for interest, depreciation, bond amortization, and other charges. The average earnings, for the years from 1925 to 1934, were $134.00 per share and the average dividends $103.00 per share. If we could capitalize the earnings upon the basis of a 6 per cent. return, the value of the shares during those nine years would have been over $2000. Upon a capitalization of the dividends upon the same basis, the value would be over $1700 per share. The net earnings have increased as the bonded indebtedness, now $220,000.00, has been reduced, and for the year 1935, up to the time of the trial, equaled those in the preceding year. There was no express contract between the two companies, but the tonnage was carried by original arrangement, succeeded by tacit understanding, at the going or market rates, which are not governed by statute but are the result of competition.

On December 21, 1934, at the annual stockholders' meeting, the subject of minority holdings for the first time was presented, when P. D. Block announced that the Steel Company had had in mind for sometime the purchase of such interests. He appointed Randall and McGean, an officer of the Pioneer Company, which likewise carried freight for the Steel Company, as a committee "to fix the value" of appellee's ships. Appellant F. M. Lebold, learning in the following January of the Steel Company's desire to acquire the minority stock, called upon Block, and was told that the committee had been appointed. In March Randall discussed with the other appellant the purchase of minority interests, saying that in arriving at a valuation earnings could not be considered; that, if the Steel Company should put the ships to hauling coal, they would earn nothing; that, if appellee should meet the lower rates being quoted by some companies, it would earn nothing; but he said, further, that the Pioneer Company had not been required to meet such lower rates.

On May 14, 1935, the committee appointed for the purpose of fixing the value of the ships submitted its report, stating that the Steel Company had said it was unwilling to continue placing traffic with appellee on the then prevailing terms, and that the committee had been appointed to consider the proposal of the steel company "to buy the minority stock" and recommending that such stock be "offered at the price of $700.00 per share." It did not report on the value of the ships. It developed that the price recommended had, in fact, been fixed by Randall,

who occupied the dual position in the two companies previously mentioned. Block stated that the desire to buy was based upon possible merger of the Steel Company with others, the possibility of enactment of a law discriminating against companies not owning their own vessels, and the fact that other shippers were transporting their freight for less money. It was not shown at any time, however, that lower rates had been actually available to the Steel Company. Randall candidly stated that, if minority stockholders did not sell at $700.00, the Steel Company, as majority stockholder, would undertake to dissolve appellee, sell its ships, and distribute the proceeds. He testified that the Steel Company would pay no more than necessary, that it would bid enough to realize $700.00 per share, but that, if a better bid should be made, it would be accepted.

Appellants said that they preferred not to sell; that they objected to selling at $700.00 per share; but that they would not refuse to sell at a fair price. Block and Randall, representing the Steel Company, refused to make any further offer or to arbitrate the value of appellants' stock. Appellants called Randall's attention to the fact that he and Block were officers of both companies, and Randall replied that, when he dealt with traffic problems, he had at heart the interests of the Steel Company, and that, in his opinion, the Steel Company had been "suckers" and had acted foolishly in permitting the minority to continue to participate in the profits.

Following appellants' refusal to accept the offer and refusal of the Steel Company to arbitrate, notice was given of a special meeting of appellee's board of directors on July 23, 1935, to act upon a resolution to pay a liquidating dividend from the liquid assets, and of a special meeting of the stockholders to consider the proposed dissolution. Thereupon appellants filed this suit to restrain the action contemplated, and a restraining order was entered. The meetings were held, but no definite action was taken. Block advised appellants that he did not see how appellants could gain anything by their action, because, if they won, there was nothing to prevent the Steel Company from placing its tonnage elsewhere. Randall testified that the motive actuating the Steel Company was the desire to avoid continuing paying dividends to the minority. He designated such payments as pouring "a golden stream to the minority stockholders." This, he said, "disturbed

him and was unfair to the Steel Company." Admitting that the Steel Company received the greater part of the dividends, he said, "I have my eye on the part that we do not get," and that, since appellants had declined the offer of $700.00 per share, he had made up his mind definitely that no more traffic would be given to appellee; that this action would result in loss by appellee, which in turn would force dissolution and liquidation. He said these statements were not made in order to coerce appellants, but to advise them of what he had in mind, and that the purpose of the Steel Company was to produce economy in transportation expense by chartering ships at a flat rate, or procuring lower rates from other carriers, or purchasing its own ships, thus assuring to itself all profits resulting from transportation. He had made no computations, however, upon any of these bases, but said that there was a surplus of ships upon the Great Lakes.

The district judge stated the law as being that, in the absence of actual fraud, a statutory percentage of stockholders may dissolve a corporation regardless of motive; that the stockholders of the Steel Company would have been justified in insisting that the situation be terminated; that the contemplated action would not effectuate a fraud upon the minority stockholders, but would bring about a pro rata distribution of assets. Pointing out that 20 per cent. of the money earned by the transportation of the Steel Company's freight was going to minority stockholders, he held that the action of the Steel Company was for its best interests; that its declared conclusion to terminate its traffic relations with appellee had been reached in good faith; that, in fixing the value of stock, the past earning record could not be considered; that the offer was fair; that, if it should be assumed that the Steel Company did intend to terminate its traffic arrangement with appellee, it would be to the best interests of all stockholders to dissolve the company.

The parties are not greatly in dispute as to the law. A West Virginia corporation can be dissolved upon vote of sixty per cent. of the shares of its capital stock, regardless of motive and expediency. Majority stockholders do not, by mere reason of their holdings, thereby become trustees for the minority stockholders under any and all situations. However, the circumstances may be such that equity will impose upon them the obligations of trustees because of their conduct. In forcing disposition of assets, they may

not overreach the minority stockholder and derive benefit from disposition of the assets, to the detriment of the minority stockholder, without being liable for the deprivation thus incurred by the latter. The minority must receive its pro rata share of the common property and the fruits of the capital investment. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099; *Jones* v. *Missouri-Edison Electric Co.* (C. C. A.) 144 F. 765. And if, as a result of action by the majority, the latter reaps a benefit from the assets in which the minority does not share, the latter has its remedy against those thus illegally profiting at its expense, and they may be compelled to make restitution. *Jones* v. *Missouri-Edison Electric Co., supra.* Thus the majority may not force a sale to itself at less than the full value. *Ervin* v. *Oregon Ry. & Nav. Co.* (C. C.), 27 F. 625. Stated otherwise, the action of the majority must be fair to the corporation, and to all stockholders thereof, for the majority becomes in effect the corporation itself and charged with the trust obligations thereof. *Ervin* v. *Oregon Ry. & Nav. Co.* (C. C.) 27 F. 625. The judgment of the majority is not to be interfered with, in the absence of circumstances creating a fiduciary relationship as mentioned or effectuating a fraud upon the minority, but in examining the facts the chancellor must scrutinize them carefully. *Ervin* v. *Oregon Ry. & Nav. Co., supra.* In short, a court of equity may not interfere with the statutory right of the majority to force dissolution and sale of the assets unless the evidence discloses an unfair advantage over the minority stockholders, with resulting injury to the latter, which they are powerless to prevent.

In the trial court below, the three officers occupying dual positions with the two companies protested their good faith in what was contemplated, presented the reasons back of their action, and disclaimed any intention to benefit at the expense of the minority. They admitted that the step toward dissolution was impelled by their failure to procure the minority stock at the price fixed by themselves, but they insisted such price was fair. It is not contended that they proposed directly to appropriate the minority stockholders' pro rata share of the assets, but it is insisted that the whole project was part of a plan to force liquidation of the physical assets of a going prosperous concern and get rid of the minority stockholders by paying them the proceeds of their share of such assets, but leaving them

without any of the fruit of their investments in the way of capitalization of earnings.

It seems to us, in view of all the evidence, that not all the essentials necessary to a complete case on the part of appellants are present. There has as yet been no disposition of the assets or loss to the minority. We cannot say that there will be any such loss. Thus far, the majority, though it has admitted its motive, has done only that which the statute permits it to do, call a meeting for dissolution. This it has a legal right to do. It may proceed to a dissolution, but what will happen then or thereafter is not now before the court, and cannot now be made the basis for a finding of fraud. On the record the bill was premature, and the court below rightfully held that the evidence does not make a case within the principles which we have outlined above.

However, we do not mean to imply that the circumstances that may hereafter develop, taken in connection with what has developed, may not bring appellants within that line of authorities which recognizes a right of action for an unfair advantage taken by a majority. Though the court was justified in holding that the facts thus far do not amount to fraud, it by no means follows that what may develop in the future may not bring about such an injury to appellants as will justify a renewal of their appeal to the chancellor.

The Steamship Company is controlled, and throughout all its existence has been operated and managed, by the majority stockholder, the Steel Company. The directors, motivated by human instincts, tempted by human impulses, under their own testimony, quite obviously have their first interest in, and make their first devotion to, the dominant company. The Steamship Company is a mere incident to the Steel Company's business, and there devolves upon the latter, therefore, as a result of this relationship, the burden of the utmost of scrupulous fair dealing with the minority of the incidental company. Thus in *Jones* v. *Missouri-Edison Electric Co.* (C. C. A.) 144 F. 765, at page 771, the court said:

> "a majority of the holders of stock owe to the minority the duty to exercise good faith, care and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock and to secure and deliver to them their just propor-

tion of the income and of the proceeds of the property. Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property to deprive the minority holders of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery."

The present case illustrates the possible evils arising from interlocking directorates. When, at a stockholders' meeting of the Steamship Company, a majority thereof voted for a dissolution of the corporation, in what capacity were they voting? By what desire were they motivated? The interests of which corporation were they promoting? They certainly were not casting their ballot for promotion of their own interest as stockholders of the Steamship Company, because by their ballot they were voting to put out of business and liquidate in a time of shipping depression a prosperous, going concern which had been paying 150 per cent. dividends upon capital investment, even in years of such depression. No benefit could accrue to the Steamship Company or its stockholders from the liquidation of its physical assets. What, then, was the guiding motive of the majority stockholders? Ordinarily we would say it was the desire to promote their interests as stockholders and directors of the Steel Company by bringing about 100 per cent. ownership of the Steamship Company in the Steel Company and thereby eliminating the minority stockholders and, perhaps, continuing the prosperous business of the Steamship Company.

There was at the stockholders' meeting and at the directors' meeting nobody interested in representing, protecting, or promoting the interests of the Steamship Company other than minority stockholders. Appellee was without that devoted representation to which it is entitled from its directors. It was without directors attempting to protect its corporate business. Clearly, from their own evidence, the majority were representing only the Steel Company.

It was said by the directors, who are also the directors of the Steel Company, that the latter will take away the business of the Steamship Company; but it should be remembered that, if it does so, it will thereby wipe out profits, 80 per cent. of which belongs to it, or, if it becomes the owner of all the assets of the latter, 100 per cent. It is not certain that other boats may be had at cheaper rates. It may be

that cutthroat competition has reduced shipping rates, but those paid in preceding years are the prevailing or going rates; any lower rates are less than prevailing market rates; and the Steel Company has not in the past procured the offer of any cheaper rates.

The directors of the Steel Company, who purport to represent also the stockholders of the Steamship Company, say that some of the boats will not draw the full tonnage possible with the new channels. The fact that deeper boats may be employed does not disqualify or put out of business the boats of the Steamship Company. It may make them less efficient in competition with other boats, but there is no showing that the other boats on the lakes, now out of employment, which might be purchased and used, are not equally inefficient.

We would be more favorably impressed by the protestations of good faith of appellee's officers had they in their capacity of representatives of the dominant company shown a willingness to submit to arbitration the value of appellants' minority stock. The majority stockholder may believe that it is entirely fair, but its position renders impartiality difficult, for it is compelled to say, "Let not thy right hand know what thy left hand doth." In view of the frankly admitted desire of the majority to acquire the stock of the minority, its frank confession that the payment of profits to the minority brings only chagrin and dissatisfaction to the majority, the threat that, unless the minority will sell to it at its own price, it will force dissolution and liquidation of assets and thus produce an opportunity to purchase at a satisfactorily low market price all the physical assets, we confess to some doubt as to eventual results. That degree of fairness required of parties in a dominant situation, or of fiduciary representatives of corporations, or of majority stockholders to the minority, making legal duress impossible, must be present before a court of equity may rest quiescent.

We are of the opinion that the District Court erred in its conclusion that the price of $700.00 was a fair price for the stock of the minority, for the reason that the court concluded as a matter of law that, in determining the value, it should not take into consideration the earning record of the company. The determination of value entails necessarily consideration of all elements that enter into value—cost of physical assets, additions, depreciation and appreciation, market price, earnings, the chances of future

successful operation, and prospects of continued earnings. From evidence as to all such elements, true valuation is to be determined. The stocks of many corporations sell for less than their book values, which ordinarily are cost, plus additions and appreciation, less depreciation and obsolescence. On the other hand, the stocks of other corporations sell for many times such value.

In view of our conclusions, it is not now necessary to determine the propriety of the district court's ruling upon the application to make the Steel Company a defendant.

The court was justified in its conclusion that the presently developed circumstances are not such as to create a cause of action in appellants, and the decree, therefore, should be affirmed. But this affirmance and the dismissal by the court below will be without prejudice to the right of appellants hereafter to present the facts herein presented in connection with such further facts, if any, as bring about a situation within the doctrine recognizing causes of action in minority stockholders. With this modification the decree is

AFFIRMED.

## APPENDIX B.

### The Second Opinion, Lebold v. Inland Steel Company, 7 Cir., 125 F. (2d) 369, Decided December 29, 1941.

Before EVANS, SPARKS, *Circuit Judges,* and LINDLEY, *District Judge.*

LINDLEY, *District Judge.* Plaintiffs, minority stockholders of the Inland Steamship Company, brought suit in the District Court to recover damages claimed to have been incurred by them by reason of alleged fraudulent acts of defendant Inland Steel Company in dissolving the Steamship Company, buying its assets and appropriating its business. The theory of plaintiffs was that defendant, owning some 80 per cent of the stock of the Steamship Company, had so utilized its dominant position as majority stockholder as to force the latter company out of a prosperous going business, to bring about its dissolution and to take over its property and its business to the detriment of plaintiffs. The court dismissed the complaint and this appeal followed.

The events preceding the dissolution and sale were before us in *Lebold* v. *Inland Steamship Co.*, 7 Cir., 82 F. (2d) 351. There a bill to enjoin dissolution had been dismissed by the District Court. Upon appeal we held the complaint premature and affirmed the dismissal, without prejudice however, to the right of plaintiffs to apply for relief if developments thereafter, coupled with what had already happened, should justify such action. Neither the facts there involved nor the law there announced need repetition.

In addition to the facts presented in that record, we have here evidence of events subsequent to that decision. Throughout the duration of the litigation involved in the prior decision, the business of the Steamship Company continued without interruption or change. The operations for the year 1935, which were not in the prior record, were successful, as had been those of all earlier years, and on December 19, 1935 the directors authorized an annual dividend of $150 per share. The decision was announced on March 18, 1936. Eight days thereafter, notice of a special meeting of stockholders was given, to be held

April 2, 1936, for the purpose of dissolution. Mr. P. D. Block, president of the Steamship Company and of the Steel Company presided. Others present were L. E. Block, a director of both corporations, Randall, vice-president, director and manager of the transportation business of the Steamship Company and also vice-president and director of the Steel Company, E. L. Ryerson, Jr., director of both companies, Morris, employee of the Steel Company and secretary of the Steamship Company, Truesdale of the Steel Company and Mullen and plaintiffs, minority stockholders, and counsel for the Inland Steel Company. Over the negative vote of the minority stockholders, a resolution was adopted directing dissolution of the Steamship Company. Block stated that the reason for such action had been submitted before and that he saw no good reason for "rehashing" it. One of plaintiffs asked Randall whether the Steamship Company had been given opportunity to bid for the Steel Company freight traffic or whether, as a director of the Steamship Company, he had made an effort to get the traffic on a competitive basis with other bids received. Randall replied that he had been instructed by President Block that "under no circumstances" did he, Block, wish to transact any business with the Steamship Company. Plaintiffs requested that the minutes reflect the fact that the Steamship Company had been given no opportunity to bid on carrying freight for the Steel Company. Block observed that the meeting was a Steamship Company meeting and not one of the Steel Company and that "they were not obligated to give any information concerning" the latter. Randall went so far as to say that but for his courtesy, he would not have replied to the question. At the trial Randall testified that he had made no effort to secure traffic for the Steamship Company from any sources other than from the Steel Company because that company had kept the Steamship Company's boats busy during 1934 and 1935. He said further that when he became "certain of dissolution," he made no effort to get traffic for the Steamship Company on the theory that it might be able to continue in business. Later a directors' meeting was held on April 14, 1936, attended by the Blocks, Randall and Foreman Lebold. The latter did not vote. The directors authorized a sale of all assets on May 1. At that time the Steel Company bid in the three boats owned by the Steamship Company at $1,120,000, apparently their fair value. There were no other bidders. Defendant immediately took over the boats. It continued the transportation

business formerly conducted by the Steamship Company and has carried it on without interruption or change, continuously, ever since.

The master found that plaintiffs were entitled only to their pro rata share of the proceeds of sale of the boats. The court agreed and dismissal followed. Plaintiffs insist that the District Court failed to apprehend the purport of and give effect to this court's decision and to draw from the facts in the record proper legal conclusions.

At the outset, giving consideration to the facts involved in the former proceeding and those presented for the first time, it is well to keep in mind that at all of the stockholders' meetings and directors' meetings involved, the majority stockholder, defendant, was in control. Defendant, owning 80 per cent of the stock, had the power to determine and did determine the actions of the Steamship Company. It is perfectly apparent, indeed, the officers of defendant themselves indicate that their interest was to force dissolution so that they might get rid of the minority interest and take over the assets and business of the Steamship Company. It is only with this elementary indisputable premise in mind that the proper answer to the controversy can be reached.

The directors of a corporation represent it and its stockholders; the majority stockholders of a corporation represent it and its minority stockholders. The vote of every director and of every majority stockholder must be directed to and controlled by the guiding question of what is best for the corporation, for which he is, to all legal intents and purposes, trustee. In his voting, in his management, he is bound to be wholeheartedly, earnestly and honestly faithful to his corporation and its best interests; his own selfish interests must be ignored. If when he votes he does so against the interest of his company, against the interest of his minority and in favor of his own interest, by such selfish action, by omission of fidelity to his own duty as a trustee, he forfeits approval in a court of equity. When the Blocks and Randall voted in the Steamship Company meeting they were within their statutory right to force a dissolution, but no legislative enactment could endow them with the right as trustees for the minority stockholders to take over for their own, through any legal device, plan or method all assets and all business of the company for which they were fiduciaries, if to do so was clearly and obviously against the best in-

terests of the company and the minority stockholders. Obviously and admittedly these gentlemen were not thinking of the Steamship Company's interest; they were wholly ignoring it. Their sole interest lay in the Steel Company and, in the words of Randall, it "griped them to see that the minority stockholders were enjoying any profit." Therefore, we must accept the obvious fact, namely, that defendant and its officials, failing to perform their duties as stockholders and directors of the Steamship Company, were faithless to that company and to the minority stockholders. The latter were powerless to help themselves; they rightfully complain of the breach of trust upon the part of defendant resulting in damage.

In *Pepper* v. *Litton*, 308 U. S. 295 at page 306, 60 S. Ct. 238, 245, 84 L. Ed. 281, Mr. Justice Douglas, discussing the responsibility of directors and of dominant or controlling stockholders, said: "A director is a fiduciary. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 588, 23 L. Ed. 328. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492, 39 S. Ct. 533, 537, 63 L. Ed. 1099. Their powers are powers in trust. See *Jackson* v. *Ludeling*, 21 Wall. 616, 624, 22 L. Ed. 492. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 599, 41 S. Ct. 209, 212, 65 L. Ed. 425. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. * * * He who is in such a fiduciary position *cannot serve himself first and his cestuis second.* He can not manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. * * * He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical require-

ments. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis." Here the strategic position of defendant was used solely for its own preferment; the affairs of the corporation were "manipulated" to plaintiffs' detriment. Here defendant did "indirectly through the corporation what it could not do directly."

Defendant says it has not appropriated the business of the Steamship Company. The statutes of West Virginia, Sec. 80, Chap. 31, Art. 1, W. Va. Code of 1931, which control the dissolution proceedings, authorize the majority to dissolve and "discontinue the business of the corporation." Here the business was not discontinued; defendant took over the boats, it continued to operate them, it continued to devote them to the same transportation that they had always carried on. The business which had been prosperous for twenty-five years was turned over to defendant. By its strategic position, by its dominant situation, it could and did force a sale, bid in the property itself and thereafter continue to operate the business as before. The Steamship Company had been organized many years before to transport freight for hire; it had transported only the freight of defendant; this it continues to do, the only difference being that now the latter realizes all the profit which results from such transportation and the minority stockholders get none of it.

This transportation business was in no wise the business of the Steel Company. It was the business carried on by the Steamship Company, a business which the defendant expressly said it was going to put out of existence. In its strategic position of dominance, even though it was trustee for the minority stockholders, defendant warned plaintiffs that if they did not sell their stock, the Steel Company would end all business relations with the Steamship Company and that they must either sell their stock or see the Steamship Company go out of business. That these threats were not idle, that they were made with the ulterior motive, to bring duress to bear and to force plaintiffs, is now obvious. The business was never interrupted, never curtailed, never modified but continued without interruption.

What defendant might have accomplished under color of the West Virginia statute was discontinuance of the busi-

ness. What it did, was to take, through form of a sale, the physical assets and the entire business of the Steamship Company. Whether we stamp the happenings as dissolution or with some other name, equity looks to the essential character and result to determine whether there has been faithlessness and fraud upon the part of the fiduciary. However proper a plan may be legally, a majority stockholder can not, under its color, appropriate a business belonging to a corporation to the detriment of the minority stockholder. The socalled dissolution was a mere device by means of which defendant appropriated for itself the transportation business of the Steamship Company to the detriment of plaintiffs. That the source of this power is found in a statute, supplies no reason for clothing it with a superior sanctity, or vesting it with the attributes of tyranny. *Allied Chemical & Dye Corp.* v. *Steel & Tube Co. of America*, 14 Del. 1, 120 A. 486. The books are full of instances of disapproval of such action. If it be an absorption by the dominant member of all the returns of the corporate investment, or a sale of the property to oneself for an inadequate consideration, or deprivation by a syndicate formed to freeze out a minority stockholder through sale and dissolution or if the buyer and seller are the same, the right of a stockholder to vote becomes a power in trust when he owns the majority and assumes and exercises domination and control over corporate affairs. Such majority stockholders' vote "must not be so antagonistic to the corporation as a whole as to indicate that their interests are wholly outside of the interest of the corporation and destructive of the interests of the minority shareholders." *Thurmond* v. *Paragon Colliery Co.*, 82 W. Va. 49, 95 S. E. 816. See, also, *Jackson* v. *Ludeling*, 21 Wall. 616, 88 U. S. 616, 22 L. Ed. 492; *Lebold* v. *Inland Steamship Co.*, 7 Cir., 82 F. 2d 351; *Ervin* v. *Oregon Ry. & Nav. Co.*, C. C., 27 F. 625; *Wheeler* v. *Abilene Nat. Bank*, 10 Cir., 159 F. 391, 16 L. R. A., N. S., 892, 14 Ann. Cas. 917; *Lehigh Valley Transit Co.* v. *Zanes*, 3 Cir., 46 F. 2d 848; *Jones* v. *Missouri-Edison Electric Co.*, 8 Cir., 144 F. 765; *Wheeler & Lake Erie R. R. Co.* v. *Carpenter*, 6 Cir., 218 F. 273; *Board of Highway Commissioners* v. *Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471; *Dowling* v. *Charleston & W. C. R. Co.*, 105 S. C. 475, 81 S. E. 313; Rohrlich, "Corporate Control by Minority Stockholders," 81 Pa. Law Review 728.

Furthermore it seems to us that defendant may not be permitted to say that there were no values other than those of physical assets. By taking over the assets and

by continuing the prosperous business of its former cestui trust defendant has removed itself from the place where it is permissible for it to contend that there is no prosperous business. That there was value over and above physical assets is perfectly obvious from the fact that a prosperous business existed and is still being conducted; that plaintiffs, if they had not been deprived of their interest, would be still sharing in the returns from that business and that at the present time all the profits of such are being enjoyed by defendant to the total exclusion of plaintiffs.

It follows that the true rule for determination of the value of plaintiffs' interest must be based upon the value not of the physical assets alone but upon all the elements mentioned in our former opinion and in arriving at such value, all those elements, including value as a going concern, must be taken into consideration. In twenty-five years the business of the Steamship Company has never ceased to be a going concern. It has been extremely prosperous. It continues to be so without threat of interruption. In this going concern plaintiffs had an interest.

Fortunately the testimony of the various witnesses of the respective parties is not greatly in controversy when this rule is followed. Plaintiffs produced testimony that, considering the earnings in the past and assuming that the business would continue to be in the future within a reasonable degree what it had been in the past, the shares of stock were worth at least $1500 each. Defendant's witnesses testified that, on the assumption that traffic relationship between the Steamship Company and the Steel Company were severed, the value of the stock would be the value of the ships. One added that if he could assume that the company would continue to earn the same amount as it had earned in the past, the value would be $2500 a share. Another of its witnesses testified that, assuming that defendant could at any time discontinue using these particular ships, the value of the stock would depend entirely upon the value of the physical assets; that he had given consideration to the past earnings but had allowed nothing on account of them because of his further assumption that defendant would cease giving its business to the Steamship Company and that there would not be other sufficient business available. He said "I did not use the earning record as an element in fixing the value; I had in mind that the company had been a big earner and yet under

the circumstances (his assumptions) could not use that element in fixing value." Another witness testified similarly and upon the same assumptions. He said, however, "I did not consider past earning power and I added nothing to the value because of that factor. I assumed that the Steel Company was not going to give" the Steamship Company any traffic and assumed that the latter had no business and no opportunity to obtain profitable business. Upon this testimony and despite the fact that defendant company has continued at all times to operate the ships as heretofore and that those have carried the same freight as formerly, the master found that defendant had not appropriated anything belonging to plaintiffs as minority stockholders and that the value of such minority interests did not exceed their pro rata shares of the proceeds of sale of the ships. The court approved this finding.

Thus it appears from both plaintiffs' and defendant's testimony that if the Steamship Company had been considered a going concern and if its business might reasonably be expected to continue, the value of plaintiffs' stock would be in the neighborhood of $2000 per share.

That the master was misled in his reasoning is apparent from some of his findings. He said "the permitted participation in handsome returns for twenty-five years seems to me a very reasonable limitation for the duration of any such obligation." Obviously this is fallacious. It is not a question of how much profit plaintiffs and defendant have previously enjoyed from ownership of stock in the Steamship Company, but a question of what the existence of the transportation business of that company, which defendant has wrongfully taken, is now fairly worth. Henry Ford could not rightfully say to one of the stockholders who invested in the Ford automobile company in its beginning and whose investment had multiplied thousands of times in value, that in view of the handsome returns he had had upon the investment, he must deliver the stock to Mr. Ford upon receipt of his pro rata share of the value of the physical assets of the Ford Company or Mr. Ford would dissolve the company and bid in the assets and deprive him of any such returns.

After the sale of the physical assets, the proceeds were divided amongst the stockholders of the Steamship Company, each receiving his proportionate share. These were treated as liquidating dividends and as such plaintiffs

receipted for them. Defendant now contends that by acceptance of the distributive share of the proceeds of sale of the boats, plaintiffs are estopped to prosecute the present suit.

No estoppel arises upon these facts. Plaintiffs are suing, not to rescind the sale, but to recover a money judgment, alleged to be due them because of their damage incurred by the fraud of defendant. This demand is for something over and above and in addition to plaintiffs' proportionate share of the proceeds of liquidation of physical assets. Estoppel arises only when one has so acted as to mislead another and the one thus misled has relied upon the action of the inducing party to his prejudice. Shortly stated, one may not assume a position inconsistent with a former position to the prejudice of his adversary. *Texas Co.* v. *Gulf Refining Co.*, 5 Cir., 26 F. (2d) 394; Pomeroy Equity Jurisprudence, Sec. 804. It is the injury accruing from inducement or silent acquiescence which creates the estoppel. *Augustus* v. *New Amsterdam Casualty Co. of Baltimore*, 7 Cir., 100 F. (2d) 581; *Arkansas Natural Gas Corp.* v. *Sartor*, 5 Cir., 98 F. (2d) 527; *United States* v. *S. F. Scott & Sons*, 1 Cir., 69 F. (2d) 728; *Clark* v. *Fisher*, 2 Cir., 8 F. (2d) 588. Pomeroy, Equity Jurisprudence, Section 805, says: "The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. * * * He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it."

Plaintiffs did not remain silent. They brought their suit prematurely and this court affirmed its dismissal because of such prematurity, expressly stating, however, that the dismissal should be without prejudice to plaintiffs to complain if future developments should justify their fears. Defendant had the right under the statute of the state in which the Steamship Company was incorporated to work a dissolution. Following that it was bound to distribute the proceeds realized pro rata amongst the stockholders, but the receipt of such share in no wise affected the complaint of plaintiffs not that the sale should be rescinded but that in prosecuting the legal procedure of dissolution defendant had over-reached plaintiffs and damaged them. Their demand for damages was not in-

volved at all in their receipt of the pro rata shares of the proceeds of sale of the Steamship Company's boats. Plaintiffs did not acquiesce in or consent to perpetration of a fraud against them. Defendant has not been misled; it has not relied, to its injury or prejudice, upon any acquiescence or inducement on the part of plaintiffs.

Upon the record defendant is liable to plaintiffs. The damages to be allowed are the difference between what plaintiffs have received from the sale of the physical assets and what the stock was really worth as stock in a going prosperous concern continuing in business. Upon that rule the trial court will fix plaintiffs' damages.

The judgment is reversed for action by the District Court consistent with this opinion.

## APPENDIX C.

**The Third Opinion, Lebold v. Inland Steel Company (R. 172-176), decided June 16, 1943 (Reported With One Paragraph Deleted and Another Paragraph Added in 136 F. (2d) 876).**

Before EVANS, KERNER, *Circuit Judges,* and LINDLEY, *District Judge.*

LINDLEY, *District Judge.* Both plaintiffs and defendant attack a judgment fixing plaintiffs' damages, in pursuance of our mandate in 125 F. (2d) 369, wherein the District Court found the value of capital stock of the Inland Steamship Company as a "going prosperous concern, continuing in business" on May 1, 1936 to be $2,350. per share. Plaintiffs assert that the evidence was such that the court could properly have fixed only a greater value. Defendant contends that the court could not rightly have attributed any value to the shares other than that of the physical assets; and, alternately, that, if additional value was to be considered, in view of the evidence, the amount fixed was excessive.

Defendant's first contention is grounded upon the premise that we were wrong in our conception of the law when the cause was last before us. Ordinarily, when a case has been once decided on appeal and remanded, whatever was before the court and disposed of by its decree is finally settled. *In re Sanford Fork and Tool Company,* 160 U. S. 247; *In re Potts,* 166 U. S. 263; *Luminous Unit Company* v. *Freeman-Sweet Company,* 3 F. (2d) 577 (CCA7). Obviously, however, if we were wrong, we have a right to, indeed, we should, correct our error. *Am. Cyn. Company* v. *Wilson & Toomer Company,* 51 F. (2d) 665 (CCA5); *Brown* v. *Gesellschaft,* 104 F. (2d) 227 (C. A. D. C.); *Johnson* v. *Cadillac Motor Car Company,* 261 F. 878 (CCA2); *Luminous Unit Company* v. *Freeman-Sweet Company,* 3 F. (2d) 577 (CCA7); *U. S. F. & G. Co.* v. *Com. Nat. Bank,* 62 F. (2d) 718 (CCA5). So, too, if the evidence now before us is such as to make inapplicable our previous announcements. With this in mind, aided by able advocates' earnest argument, we have examined again the principles of law

involved and found controlling on the previous record, in the light of not only what was previously presented but also of what was before the court upon the trial on the merits. After mature and deliberate consideration, we conclude that nothing now urged justifies any modification of our earlier announcement.

We have, then, the question of whether the allowance was excessive or inadequate.

The direct evidence as to value consisted of the testimony of expert witnesses supplemented by various charts and comparative analyses of other like and unlike corporations.

Plaintiffs' witnesses approached the problem from the investor's point of view, assuming a willing buyer and a willing seller, each equally well informed as to the facts. They supplied thirty-two charts demonstrating that the general trend of iron and steel production and shipments of ore on the Great Lakes were, in 1934 and 1935, on the upgrade, and that the ship company and defendant had made more rapid improvement than the industry in general. They included an exhaustive analysis of cargo rates, length of time the ship company's vessels were in commission, the average time of cargo runs, the number, gross tonnage and types of cargoes carried, total earnings, operating expenses, net earnings, operating ratio and net income from 1928 through 1934 and 1935, insofar as the figures were available.

Capitalizing the shares on the same ratio as the steel company's stock's quoted market prices bore to its earnings, they fixed the value in excess of $3000 per share. Capitalizing them on the basis of $150 dividends, on the same ratio as other quoted securities' market values bore to declared dividends, they thought the resulting value for a share of the ship company would be as follows: (1) on the basis of U. S. Government bonds, maturing or callable after 12 years, $5689; (2) on the basis of 30 corporate Moody AAA bonds, $4167; (3) on that of 30 similar AA bonds, $3947; (4) on that of 30 "A" bonds, $3505; (5) on that of 30 BAA bonds, $2918 and (6) on the basis of stock of 120 corporations on the N. Y. stock exchange, $3563; (7) on 120 bonds, classified by industry, 40 industrials, $3886; 40 railroads, $3348 and 40 public utilities, $3505; (8) on common stocks, 14 industrial heavy industries, $4000, 8 operating railroads, $3488 and 16 leased railroads, $2885. These values were proportionately increased when capital-

ized on the basis of annual earnings of $164 (the ratio actually existing January 1 to May 1, 1936) or $178 (average earnings in 1933, 1934 and 1935) or $192.03 (earnings for 1935) or $200, (as a projected future earning), the figures upon the last basis, $200, being as follows: on the basis of operating railroads, $3361, leased railroads, $3868, industrials, $4452 and Inland Steel Company, $3155. Among the corporations compared were: Ingersoll-Rand Company, International Harvester Company, Mesta Machine Company, General Electric Company, Pullman, Inc., General Motors, Diamond Match Company, United States Gypsum Company, Harbison-Walker Refractories Company, The Glidden Company, Otis Elevator, Firestone Tire & Rubber Company, The Timken Roller Bearing Company, Kennecott Copper Corporation.

Defendant, capitalizing eleven years' average earnings of the ship company at 10 per cent, computed the value of each share at $1289; using the years 1933, 1934 and 1935, on the same basis, its testimony was that the value was $1636.10; and, using the seven years, 1927 to 1935 inclusive (excluding both 1929 and 1932 as exceptional in two extremes), $1534.90. Defendant submitted also evidence of value upon the hypothesis that the existing traffic arrangement would continue for one year, its estimate being $714.13 per share, and, if the situation should remain unchanged for two years, $818.39 per share. Defendant also offered proof as to the earnings of other ship companies, engaged in independent business, over periods of eleven, seven, five and three years and attempted to demonstrate that, from a comparative viewpoint, the stock of the ship company was fairly worth $706 per share, on the seven years' earnings basis, and even less on the basis of the other periods. On the assumption that the traffic arrangement would have persisted for one year and that at the end of that time the Steel Company would have entered into competition with the ship company, defendant presented a computation of $779.25 per share.

The writer of this opinion has inclined toward the view that the evidence amply supports the District Court's finding as to damages, but the majority believes that the allowance was too liberal and in determining the soundness of that conclusion it is well to keep in mind that this is a suit in equity where the evidence is preserved for our reviewing examination. The testimony of the various expert witnesses was based upon the historical facts appearing in the

annals of the ship company and in the industrial and financial records of other corporations. Various theories of capitalization, based upon these facts, resulted in variant conclusions. The wide range of expert opinion covered valuations running from $224.90 to $3200 per share. Plaintiffs' witnesses gave emphasis to capitalization of past and projected earnings. Defendant's dwelt more largely upon earnings and capitalization of allegedly comparative carriers. It now directs our attention to the absence of contractual relation between the Steel Company and the ship company; the possibility of termination of all relationship and the probable earnings of the ship company, were the relationship dissolved, as a competitive contract carrier at prevailing rates. We think the court rightly considered the enlightening testimony offered by each party, but it is the conviction of the majority that too much credence was given to the rosy prognoses of plaintiffs and too little to the deterring elements cited by defendant. After mature and careful analysis of all the evidence, therefore, the court finds that it does not justify a finding of value of the shares in excess of $1350 each or an allowance of damages in excess of the difference between that value and the amount plaintiffs have received.

We think the District Court properly allowed interest at the rate of five per cent from May 1, 1936, inasmuch as defendant has been declared guilty of a breach of trust and plaintiffs have been deprived of their property from the time of such breach. *Golden* v. *Cervenka*, 278 Ill. 409; *Duncan* v. *Dazey*, 318 Ill. 500; *Southern Pacific Ry.* v. *Bogert*, 250 U. S. 483; *Ervin* v. *Oregon Ry. & Nav. Co.*, 27 Fed. 625; *American Seating Co.* v. *Bullar*, 290 Fed. 896; 2 Scott, Trusts, 1107; 4 Bogert, Trusts and Trustees, 2502.

The judgment will be reversed and remanded with directions to the District Court to render judgment in accord with the announcements herein contained.

## APPENDIX D.

**The Fourth Opinion, Lebold v. Inland Steel Company (R. 223), Decided July 16, 1943 (Reported as a Part of the Second Opinion in 136 F. (2d) 876).**

### UPON PETITIONS FOR REHEARING.

Apparently there is confusion upon the part of one of the parties to the effect that it was the intent of our opinion that judgment be reversed and the cause remanded for a new trial. Such was not our intention. Accordingly, to remove any ambiguity, the last paragraph of the opinion is hereby deleted. The court modifies the judgment of the District Court by reducing plaintiffs' damages to the difference between what they have received and Thirteen Hundred Fifty Dollars ($1350) for each share of stock held by them respectively, together with costs in the District Court and interest at the rate of 5% from May 1, 1936. Thus modified, the judgment is affirmed. Each party shall pay one-half the costs in this court.

The petitions for rehearing are denied.

Draft judgment computing and fixing the total damages may be submitted.

(26)



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

## Nos. 427 and 428

INLAND STEEL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
*Respondents.*

**BRIEF IN OPPOSITION TO PETITION OF INLAND STEEL COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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## BRIEF IN OPPOSITION TO PETITION OF INLAND STEEL COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

In its opinion of December 29, 1941, the court below accurately observed:

> "At the outset, giving consideration to the facts involved in the former proceeding and those presented for the first time, it is well to keep in mind that at all of the stockholders' meetings and directors' meetings involved, the majority stockholder, defendant [petitioner], was in control. Defendant, owning 80 per cent of the stock, had the power to determine and did determine the actions of the Steamship Company. It is perfectly apparent, indeed, the officers of defendant

> themselves indicate that their interest was to force dissolution so that they might get rid of the minority interest and take over the assets and business of the Steamship Company. It is only with this elementary indisputable premise in mind that the proper answer to the controversy can be reached." (125 F. (2d) 369, 372.)

The petition now before the court does no more than say that under West Virginia law a majority stockholder may be as free as the wind in the exercise of his powers of corporate control, and that, therefore, the premise asserted and found controlling by the court below may not be considered at all. A short and sufficient answer is found in the following quotation from the very decision of the West Virginia Supreme Court relied on by petitioner (*Thurmond* v. *Paragon Colliery Co.*, 82 W. Va. 49; 95 S. E. 816, 818), where, with respect to a stockholder's voting rights, the court said:

> "The only restriction upon this right of a shareholder seems to be that the matter must not be illegal nor *ultra vires*, and the action of the *majority* of its shareholders must not be so antagonistic to the corporation as a whole as to indicate that their interests are wholly outside of the interest of the corporation and destructive of the interests of the minority shareholders." (Emphasis supplied.)

In the light of this clear announcement by West Virginia's highest court (relied on by the Circuit Court of Appeals, 125 F. (2d) 369, 374), it is impossible to say that the Circuit Court of Appeals has announced a rule, potentially governing a substantial number of other cases, in conflict with a rule announced by authoritative state court decisions.

**Statement.**

Petitioner's statement of the matter involved contains much material not germane to the inquiry whether the decision below is actually in conflict with the law of West Virginia or with the decision of this court in *Southern Pacific Ry. Co.* v. *Bogert*, 250 U. S. 483. It also omits many essential facts, most of which are concisely stated in the following two paragraphs from the opinion of the court below of December 29, 1941, reported in 125 F. (2d) 369, 373:

"Defendant says it has not appropriated the business of the Steamship Company. The statutes of West Virginia, Sec. 80, Chap. 31, Art. 1, W. Va. Code of 1931, which control the dissolution proceedings, authorize the majority to dissolve and 'discontinue the business of the corporation.' *Here the business was not discontinued;* defendant took over the boats, it continued to operate them, it continued to devote them to the same transportation that they had always carried on. The business which had been prosperous for twenty-five years was turned over to defendant. By its strategic position, by its dominant situation, it could and did force a sale, bid in the property itself and thereafter continue to operate the business as before. The Steamship Company had been organized many years before to transport freight for hire; it had transported only the freight of defendant; this it continues to do, the only difference being that now the latter realizes all the profit which results from such transportation and the minority stockholders get none of it.

"This transportation business was in no wise the business of the Steel Company. It was the business carried on by the Steamship Company, a business which the defendant expressly said it was going to put out of existence. In its strategic position of dominance, even though it was trustee for the minority

> stockholders, defendant warned plaintiffs that if they did not sell their stock, the Steel Company would end all business relations with the Steamship Company and that they must either sell their stock or see the Steamship Company go out of business. That these threats were not idle, that they were made with the ulterior motive, to bring duress to bear and to force plaintiffs, is now obvious. *The business was never interrupted, never curtailed, never modified but continued without interruption.*" (Emphasis supplied.)

It is thus seen that the alleged conflict with the West Virginia law can arise only if under that law a majority stockholder cannot commit a breach of trust, however completely in his own interest he may exercise his corporate powers. What has already been said affords an adequate basis for determination of the alleged conflict with the West Virginia law.

The alleged conflict with this court's decision in the case of *Southern Pacific Ry. Co.* v. *Bogert*, 250 U. S. 483, can arise only if the standards for determining the value of respondents' stock in Steamship Company could result in enrichment of the minority stockholders at the expense of the majority. The petition, with respect to this matter, gives an erroneous impression of the legal standards of value laid down by the court below, and some comment is necessary.

The court below clearly indicated that the question was "what the existence of the transportation business of that company, which defendant has wrongfully taken, is now fairly worth," and said that the damages were to be measured by "what the stock was really worth as stock in a going, prosperous concern continuing in business." (125 F. (2d) 369, 375.) The court said that consideration must be given to all of the elements of value mentioned in its former opinion, "including value as a going concern." (125 F. (2d) 369, 374.) In the former opinion the court

said that "the determination of value entails necessarily consideration of all elements that enter into value—cost of physical assets, additions, depreciation and appreciation, market price, earnings, the chances of future successful operation, and prospects of continued earnings." (82 F. (2d) 351, 356.)

These references demonstrate that the petition is erroneous when it states that the District Court included, as an asset for valuation, "the asserted property right of the Steamship Company as a going concern to carry the Steel Company's traffic." (Pet., p. 2.) The petition is likewise erroneous in stating that the judgment of the Circuit Court of Appeals represented "a valuation solely of the alleged property right of the Steamship Company to carry the Steel Company's traffic at capacity operation and at going rates for an indefinite time in the future." The courts below simply charged petitioner with the value of the business it appropriated on the date of appropriation.

**Jurisdiction.**

The petition states (p. 17) that jurisdiction is invoked to review not only the judgments of July 29, 1943 but also the decision on the prior appeal rendered on December 29, 1941, and the ensuing judgment of the court remanding the cause to the trial court for assessment of damages. Whether such jurisdiction exists is not clear. The decision of December 29, 1941 was final in the sense that it fully adjudicated the question of liability and the legal standards to be applied in determining the measure in dollars of that liability. Whether the observations in *Hamilton Shoe Co.* v. *Wolfe Brothers*, 240 U. S. 251, are now applicable is not certain That case was decided when, as the court itself then observed, its power to review by certiorari was "to be exercised sparingly," and when the writ was still referred

to as an "extraordinary writ" (240 U. S. 251, 258). Since the writ of certiorari (in view of the legislative changes of 1925) has become the source of the larger percentage of cases reviewed by the court, it is suggested that the denial of the first petition (April 27, 1942, 316 U. S. 675) may fairly be controlling where the second presents no different question.

As a matter of fact, the result petitioner seeks cannot be reached merely by extending the scope of review to the decision and judgment of December 29, 1941, rendered on the prior appeal in this case. It would be necessary also to review the decision in the first action instituted by respondents, *Lebold* v. *Inland Steamship Company*, 82 F. (2d) 351. As noted, that decision, in order to reverse the District Court's dismissal with prejudice, found that petitioner was a fiduciary, and that the offer to respondents of $700 per share for their stock in the Steamship Company was less than fair because the District Court erroneously concluded "as a matter of law that, in determining the value, it should not take into consideration the earning record of the company." (82 F. (2d) 351, 356; March 18, 1936.) This is a final adjudication of a matter necessary to the decision in that case, binding on petitioner as a stockholder of the defendant in that case (*Royal Arcanum* v. *Green*, 237 U. S. 531; *Converse* v. *Hamilton*, 224 U. S. 243) and not now subject to review by this court (*Toledo Scale Company* v. *Computing Scale Co.*, 261 U. S. 399). It forecloses the arguments now urged by petitioner.

A further question is the absence from the record of the opinion and decree of December 29, 1941. If this were a petition to review a state court judgment the omission would be fatal (*Gersch* v. *Chicago*, 226 U. S. 451). This court has more than once indicated it will not consider matters outside the record before it (*McClelland* v. *Carland*,

217 U. S. 268, 283; *Edward Hines Trustees* v. *Martin*, 268 U. S. 458, 465), although the record of prior litigation may be reviewed when properly pleaded (*Independent Coal Co.* v. *U. S.*, 274 U. S. 640, 647). Paragraph 1 of this court's Rule 38 requires that the record shall include "the proceedings in the court to which the writ is asked to be directed."

## SUMMARY OF ARGUMENT.

1. There is no conflict with the West Virginia law. The court below recognized the statutory power of the majority to discontinue the business of the Steamship Company but properly found this to be a power in trust. The majority stockholder of a West Virginia corporation may not use his voting power for the purpose of destroying the interests of minority shareholders in the corporate enterprise (*Thurmond* v. *Paragon Colliery Co.*, 82 W. Va. 49, 95 S. E. 816, 818, *Gilmore Manufacturing Co.* v. *Lewis*, 105 W. Va. 102, 141 S. E. 529, 532). There is nothing to indicate that the West Virginia courts would not have been as quick to condemn petitioner's conduct as was the court below. While West Virginia permits a majority stockholder to purchase corporate assets, the courts will always scrutinize the transaction carefully to determine its complete fairness (*Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 102 S. E. 249, 255), and in a situation where the transaction may not be unscrambled will require payment to a non-assenting minority of their share of the fair value of the corporate assets disposed of (*Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 102 S. E. 249, 255; 89 W. Va. 402, 109 S. E. 339, 341). In this case fair value was based on a method of valuation which gave proper weight to going concern value.

2. There is no conflict with this court's decision in *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483. Indeed, that case is a square authority, relied upon by the court below, for the essential conclusion that petitioner was a fiduciary. The same may be said of this court's decision in *Pepper* v. *Litton*, 308 U. S. 295, 310. There is nothing in the *Southern Pacific case* that conflicts with the controlling principle

adopted by the court below that the minority was entitled to receive the fruits of its capital investment and might not be excluded therefrom. Any contrary decision would be in clear conflict with both of the decisions of this court referred to in this paragraph.

3. Since there is no conflict on the question of West Virginia corporate law, it is immaterial whether the question decided is an important one.

## ARGUMENT.

### I.

**There Is No Conflict Between the Decision of the Circuit Court of Appeals and the Statutes or Decisions of West Virginia.**

We are not here concerned with abstract questions of West Virginia corporation law, nor with the statutory power of 60% or more of the stockholders of a West Virginia corporation to "resolve to discontinue the business of the corporation" (Section 80, Article I, Ch. 31, of the Code of West Virginia on Corporations, West Virginia Code of 1937, § 3092). Petitioner did not discontinue, but appropriated and continued, the business of the Steamship Company. As majority stockholder its power to discontinue the business of its subsidiary was a power in trust (*Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492, 39 S. Ct. 533, 537, 63 L. Ed. 1099; *Pepper* v. *Litton*, 308 U. S. 295, 306, 60 S. Ct. 238, 245, 84 L. Ed. 281). There is nothing in the West Virginia law that says otherwise.

The cases cited by petitioner do not support the propositions which they are supposed to sustain.

1. *It is not true under the law of West Virginia that a majority stockholder "has no duty to consider the interests of other stockholders."*

In support of this proposition petitioner cites (Pet., p. 20) *Thurmond* v. *Paragon Colliery Co.*, 82 W. Va. 49, 53, 54; 95 S. E. 816, 817. The court expressly stated in that case that "the action of the *majority* of its shareholders must not be so antagonistic to the corporation as a whole as to indicate that their interests are wholly outside of the

interest of the corporation and destructive of the interests of the minority shareholders'' (95 S. E., at p. 818). The court below relied on this decision (125 F. (2d) at p. 372). To the same effect is *Gilmore Manufacturing Co.* v. *Lewis,* 105 W. Va. 102, 141 S. E. 529, 532.

The comment on the scope of the West Virginia statute in the note from 10 University of Chicago Law Review, 82, (Pet., p. 20) is obviously inconsistent with the clear rule laid down in the above quotation and may be entirely disregarded.

2. *The law of West Virginia does not authorize a majority stockholder to purchase the assets of a corporation for less than their fair value.*

We do not understand the pertinence of the statement (Pet., p. 21) that West Virginia law does not require ''that a majority stockholder purchasing properties of the corporation must account for a price which includes future profits that may be made from those properties.''

There is no such issue in this case. The Circuit Court of Appeals held petitioner liable for going concern value. The court said that elements of value that must be considered included ''earnings, the chances of future successful operation, and prospects of continued earnings'' (82 F. 2, at p. 356). But it required no accounting for future profits.

*Reilly* v. *Oglesbay,* 25 W. Va. 36, does not consider such a question. After approving the New York rule that directors may not be interested in the purchase of corporate property, the court observed that the corporation in question had no board of directors, and that ''the stockholders assumed and performed the duties which ordinarily belong to a board of directors'' (id., p. 43). Observing that if certain charges of the plaintiffs were true, the majority of the

stockholders "are then in fact both seller and purchaser", the court stated: "This, of course, would not be permitted without the consent and approval of every stockholder of the corporation" (id., p. 44).

These comments by the court shows the inapplicability here of the dictum in the paragraph quoted (Pet., p. 21) that the general rule is that a "stockholder of such corporation may purchase".

The case of *Warren* v. *Black Coal Co.*, 85 W. Va. 684, 690, 102 S. E. 672, 674, considered only the question whether a corporation, organized by the stockholders of an insolvent corporation, may purchase its properties at a fair judicial sale without being charged with its obligations. It has nothing to do with the question here involved.

*Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 559, 102 S. E. 249, 255, while announcing that a sale to a majority stockholder for a fair price would be proper, actually held that the sales there involved were for less than adequate consideration and therefore not binding on the minority stockholders.

*Wiley* v. *Reaser*, 86 W. Va. 415, 423, 103 S. E. 362, 365, went no further than *Warren* v. *Black Coal Co.*, just discussed, and approved the purchase of corporate property by some of the stockholders at a sale pursuant to execution upon a valid judgment at its fair value.

*Howard* v. *Tatum*, 81 W. Va. 561; 94 S. E. 965, holds that a director may purchase corporate property when the purchase is pursuant to a stockholder's resolution fixing the price at which the property should be sold. Significant in this case was the court's conclusion that the assets sold brought full value; that all stockholders had an equal opportunity to participate in the purchase; and that a number of persons besides the directors became purchas-

ers, some of them purchasing very much more than any one of the directors (94 S. E., at p. 968).

These cases only support and do not detract from the decision of the Circuit Court of Appeals requiring petitioner to pay to respondents their share of the full value of the business of the Steamship Company which petitioner appropriated.

3. *There is no conflict with the decisions of the West Virginia court in the case of Tierney* v. *United Pocahontas Coal Company.*

The petition correctly states (page 22) that: "Under the law of West Virginia the majority stockholder buying the assets of a corporation must pay a fair price". That was the holding of the Court of Appeals. That was the holding in *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 102 S. E. 249, 255. There is no conflict.

The petition seeks to create a conflict by asserting that "Under the law of West Virginia, the right to carry the traffic of the Steel Company was not a property right of the Steamship Company to be included in its so-called going concern value" (Pet., p. 23).

The decisions in *Tierney* v. *United Pocahontas Coal Co.* may not be so construed. That was a case where the majority stockholder of two corporations caused their assets to be sold to a third corporation, all the stock of which he owned. The sale price was found to be inadequate and the purchasing corporation was held liable for the difference between what was paid and the fair value of the assets sold. In reaching this conclusion the court did refer (as the petition states, p. 22) to the price at which the assets involved would change hands between a willing disinterested buyer and a willing seller, as a measure of the fairness of the price. In this standard there

is no inconsistency with the decision of the Circuit Court of Appeals.

It is asserted, however (Pet., p. 22), that the Tierney case establishes that a minority stockholder "has no right to an interest in the property after the sale or to an accounting for the profits that the majority may make out of that property. * * * He can only recover for his share of the actual value of the property * * * [and] is not entitled to profits depending upon future conditions and contingencies".

Support for these broad propositions is not to be found in the *Tierney case*. The properties there involved were coal mining leaseholds. The minority urged as an element of value the sum of $2,000,000, representing the *estimated present worth* of profits derivable from operation of the properties, during the potential lives of the leases. The court held that "The probability of profits to arise from the operation of the properties is only a circumstance indicating their value. * * * they cannot be accepted as constituting present values in and of themselves. * * * The trial court limited the evidence of probable profits to its proper function, namely, *reflection of value in the property and rights of the companies*" (109 S. E. 339, 341; emphasis supplied).

The opinion then approved the valuing of the leases, machinery, buildings, appliances, operating capital and equipment of all kinds at a sum equivalent to ten cents per ton for all of the coal subject to the lease. This was an established practice in that business and had no relation whatever to the value of the coal in the ground. Since the court found that a mining lease under which nothing had been done was without market value, the method approved was obviously an enterprise or going concern valuation. The court recognized that a value might also be

based on probable profits but observed that in connection with certain offers "no price was based upon *both* estimated profits and tonnage combined." Since the claimants in that case were allowed recovery on the basis of tonnage value as defined, their duplicitous claim to be allowed something also for prospective profits obviously had to be rejected.

There is no conflict between the decision of the *Tierney case* and the decision of the court below. Respondents have not sought, nor has the court given them a "right to an interest in the property after the sale" (except as possible security (O. R. 15)), nor "an accounting for the profits that the majority may make out of their property." The court below has said that they were entitled to their share of the actual value of the going business of the Steamship Company appropriated by petitioner. There does not seem any doubt that a West Virginia court would have made the same finding.

There is no law in West Virginia which holds that "the right to carry the traffic of the Steel Company was not a property right of the Steamship Company to be included in its so-called going concern value." It is the law of West Virginia, as it is everywhere else, that a majority stockholder must pay fairly for the corporate assets.

## II.

### There Is No Conflict With the Decision of This Court in Southern Pacific Railway Co. v. Bogert, 250 U. S. 483.

There is no conflict between the decision of the Circuit Court of Appeals and this court's ruling in the *Southern Pacific Co.* v. *Bogert*.

It is true that in the *Southern Pacific case* this court, under the peculiar circumstances of that case resulting

from the floating indebtedness of the old company, properly held that, before the minority stockholders might participate, they would have to make some contribution with respect to such indebtedness. This conclusion naturally followed from this court's declaration that "The purpose of this proceeding is not to punish the Southern Pacific but to declare and enforce its obligation as trustee." (250 U. S. 483, 497.)

Respondents at no time have sought to "punish" petitioner, but only to enforce its obligation as trustee. Indeed, it does not seem possible that under the *Southern Pacific case* any federal court could do otherwise than find that petitioner was a trustee. No other decision could be consistent with the principles announced by this court in *Pepper* v. *Litton*, 308 U. S. 295.

Petitioner in effect asserts, however, that respondents are unjustly enriched by the ruling that petitioner must pay them "a large award of damages arrived at by capitalizing past earnings, resulting from the carriage of the traffic of the Steel Company in the past, a right which was no part of the Steamship Company's 'common property'" (Pet., p. 23). This is merely petitioner's conclusion. If it were sound as a premise, it might provide a basis for invoking the principle of the *Southern Pacific case*. It is not sound as a premise, for the matter of consideration of (not capitalizing) past earnings was only one of the elements of value required under the decision of the court below. Petitioner's real complaint is that it has been adjudicated to be a faithless trustee and has been held to account for the value of that which it wrongfully appropriated for its own use to the detriment of its *cestuis que trustent*. We are not advised of any decision of this court that would not uphold such a conclusion.

The discussion of the stipulation that there was no contractual arrangement between the Steel Company and

the Steamship Company with reference to the carrying by the Steamship Company of the tonnage of the Steel Company is irrelevant. While a trustee's duties may be measured by express contract where it is acting under a written document, there is no need for such a document, and it has long been a primary function of courts of equity to enforce fiduciary obligations. Respondents have not based their claim upon contractual obligation, but upon the higher duty imposed upon a majority stockholder in control of a corporation and its affairs. It may well be doubted whether petitioner would have been deterred by the existence of a mere contract when it so completely disregarded the clear adjudication of the Court of Appeals in *Lebold* v. *Inland Steamship Company*, 82 F. (2d) 351, that petitioner was a fiduciary.

Nor do respondents assert that the traffic arrangement had to be perpetual. Petitioner found it to its interest to maintain this policy during twenty-four years of operation, and sought to "terminate" it only because it wanted to exclude these respondents from their participation in it. Petitioner benefited by the arrangement. This benefit flowed, not only from its own capital invested in the Steamship Company, but also from the capital of respondents. The respondents at no time have resisted petitioner's desire to own the Steamship Company's business outright. They originally offered to arbitrate the question of value, but this petitioner refused to do (O. R. 55). They ask only that they be paid fairly for the value of their investment, which, under policies beneficial to petitioner, greatly increased over the original investment during the life of the Steamship Company. This increase inured to petitioner just as much as to respondents, ratably according to their holdings. Respondents are just as much entitled to their pro rata share as is the petitioner. *But the petitioner is not entitled to the respondents' share.*

## III.

**Since There Is No Conflict on the Question of West Virginia Corporate Law, It Is Immaterial Whether the Question Decided Is an Important One.**

It is clear from what has been said that at most the decision of the Circuit Court of Appeals is an application to the facts of this case of well recognized equitable principles. There is no basis for saying that a West Virginia court would not arrive at the same decision, but whether this be true or not is immaterial.

It is not true that the Court of Appeals has decided that a corporate majority stockholder doing business with its subsidiary "must continue to do so indefinitely or if it terminates the relationship, account on the theory that the business would have continued indefinitely" (Pet., p. 25).

In the case at bar the matter of the continuation of the business is not a *theory*. It is a fact. Petitioner never intended to discontinue the business but only to eliminate respondents from their participation in it. This course of conduct was a breach of its fiduciary obligation, and that is the basis of its liability. As is demonstrated by the opinions of the court below, this conclusion is supported by the overwhelming weight of authority, including West Virginia.

It is respectfully submitted that the petition of Inland Steel Company for a writ of certiorari herein should be denied.

Respectfully submitted,

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